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Response: Liberal Political Theory and the Prerequisites of Liberal Law

Mark Tushnet*

Professor Kautz, a political theorist, tells lawyers to stick to our lasts.¹ We ought to do only law and refrain from seeking assistance from political theory. This is not, however, because we are likely to do badly as consumers of political theory. Rather, Professor Kautz insists on a reasonably sharp distinction between roles. Political theorists “educate the public mind,” whereas lawyers, in our capacity as lawyers, do law. Of course, in other roles lawyers may seek to educate the public mind as well. And there, I think, lies one of the two problems I wish to address here. I doubt that a sharp distinction can be drawn between doing law and educating the public mind. My second difficulty is that Professor Kautz’s sense—I cannot call it more than that, in light of the allusiveness of his comments—of what law “is” seems to me substantially inaccurate. These two problems are related: Precisely because the outlines of the law are less clear than Professor Kautz appears to believe, the distinction between doing law and educating the public mind is quite thin.²

For the moment, let me accept the distinction between doing law and educating the public mind. The difficulty with that distinction comes in Professor Kautz’s final section, where he turns from political theory to social criticism. In this section he sharply criticizes

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1. To mix a metaphor.

2. Part of the difficulty lies in Professor Kautz’s unelaborated reference to law. Although he is not explicit, the tenor of his comments seems to be that law consists of the coercive imposition of sanctions or foreclosure of opportunities. (Or at least the creation of a bargaining structure enforced by the threat of coercive sanctions against those who seek to gain advantage by acting outside the law’s bargaining structure. I doubt that much turns on the distinction between law as (direct) coercion and law as creating a bargaining structure enforced (indirectly) by coercion, and so I will speak only of law as coercion in what follows.) So, for example, he does not concern himself with the proposition that the courts may conduct a vital national seminar, see Eugene Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952), or act as republican schoolmasters, see Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127.

Ronald Dworkin for urging a “fusion of constitutional law and moral theory.”³ As Professor Kautz sees things, Professor Dworkin in so urging fails to respect the proper limits of law. The difficulty, of course, is that Professor Dworkin is not acting as a lawyer when urging this fusion, for he is not exercising, or even directly participating in the exercise of, law’s coercive power. Indeed, in this section Professor Kautz does not mention a single decision by a court or even an argument any lawyer actually made to a court.

Professor Dworkin is of course trained as a lawyer, and he was the principal author of a brief submitted to the Supreme Court in the assisted-suicide case. But, importantly, that brief was also published in the *New York Review of Books*.⁴ In this connection John Hart Ely’s famous quip comes to mind as indicating what Professor Dworkin’s enterprise is. Like Professor Kautz, Professor Ely believed that Professor Dworkin typically makes arguments that he thinks courts ought to appropriate directly. Professor Ely wrote, “The Constitution may follow the flag, but is it really supposed to keep up with the *New York Review of Books*?”⁵ But the very fact that Professor Dworkin’s essays are published in the *New York Review of Books* rather than, for example, as briefs submitted to courts shows that the essays are not part of Professor Dworkin’s practice of law. Rather, in these essays he is acting as a political theorist, writing articles and books that he hopes will educate the public mind. Of course, like any political theorist, Professor Dworkin might be mistaken about what our political society or legal system ought to do. His political theory might be wrong and the public mind would be *miseducated* were it to learn from him. I suppose Professor Kautz’s comments might be taken as a criticism of that sort. But then we need to consider the means by which political theorists succeed in educating the public mind.

Here Professor Kautz’s model is the statesman, who holds a set of principles (good ones, we hope) and acts to lead the public to conclusions it would not immediately accept.⁶ Dissenting in *Romer v. Evans*, Justice Scalia criticized the majority for “imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected.”⁷ Suppose, however, that

3. Steven Kautz, *Liberty, Justice, and the Rule of Law*, 11 YALE J. L. & HUMAN. 435, 458 (1999) (quoting RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 149 (1st ed 1977)).

4. Ronald Dworkin, *Assisted Suicide: The Philosophers’ Brief*, N.Y. REV. BOOKS, Mar. 27, 1997, at 41.

5. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 58 (1980).

6. I use the term *statesman* deliberately and because of, not despite, its masculinist cast, which emphasizes the narrow arena of the tradition in which Professor Kautz writes.

7. 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

the majority was not “imposing” a solution, an issue I take up later. Consider the possibility that the justices in the majority were acting as statesmen. Then the criticism that they were acting as an elite would be misplaced. The statesman’s relation to the public is that of leader to follower, or of elite to the masses.

The statesman’s actions are, in the standard term, prudent, structured by the statesman’s awareness of a gap, which he seeks to close, between what justice requires and what the public is at present able to accept. So, for example, Abraham Lincoln acted in a statesmanlike way in signing the Emancipation Proclamation. Its strict terms had a quite limited scope but it announced a general principle that Lincoln hoped the people would come to accept, in part *because* he issued the Proclamation.

Now consider Professor Dworkin as a statesmanlike political theorist. Professor Kautz argues that liberal political theory contains a thin commitment to the rule of law as a means of ensuring liberty through security, and a thicker commitment to more precisely defined principles. But, he argues, the public does not (yet?) accept the thicker commitments, which therefore are inappropriately enforced coercively through law. Professor Dworkin is of course concerned about liberalism’s thicker commitments. He may know that Rawls’s principles of justice are not yet acceptable to the general public, even if they do state the truth about distributive justice.⁸ He also certainly knows that the courts as they are presently constituted are not going to adopt Rawls’s principles to guide their coercive imposition of law. But, acting as a statesman whose job is political theory (rather than, for example, executive leadership as was Lincoln’s), Professor Dworkin writes books and articles aimed at reshaping popular and judicial understanding of the proper role of courts. And Professor Dworkin could believe that, by the time his work has been assimilated by the courts, people will in fact willingly consent to Rawls’s principles. As a prudent political theorist, that is, Professor Dworkin pursues a program of educating the public mind so that the people will someday consent to the principles of liberalism, both thin and thick.

Of course this picture of Professor Dworkin’s activity could be mistaken. Perhaps Ronald Dworkin would be ecstatic to awaken next week to read that the Supreme Court has unanimously decided to adopt Rawls’s principles of justice as the correct interpretation of

8. I do note that in my view Professor Kautz misreads Rawls’s position in *Political Liberalism*. I believe that Rawls rather clearly does *not* believe that his principles of justice state a “truth beyond popular consent.” Political liberalism is a method of ordering political society that, Rawls believes, will lead in the long run to popular consent to his principles of justice. See JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

the Equal Protection Clause even though the people were unwilling to accept those principles. I doubt that Professor Dworkin is so deluded as to believe that this fantasy will be realized. Living in the real world, we ought to assess his books and articles as efforts in political theory, not law, and in so doing we need to have some idea about how substantive political theories work their way into coercive law. To be cogent, Professor Kautz's criticisms of Professor Dworkin and others must rest on an account of the connection between educating the public mind and imposing coercive law. Because Professor Kautz does not provide the needed account, his criticisms are ultimately unsupported.⁹

My second concern is that Professor Kautz's account of law is imprecise. He describes his image of law early in his paper. It should be "established, settled, [and] known," and applied by "a known and indifferent judge."¹⁰ The burden of jurisprudence in this century has been to show that these criteria cannot be met by any system of law. I do not wish to restate in detail the well-known criticisms of legal formalism except to assert that the criticisms seem to have established—as a truth about law—that any reasonably complex legal system will contain incompatible rules and principles. The effect is to have a legal system whose rules and principles are established, settled, and known in the abstract, while at the same time having a rather wide range of uncertainty about the application of the rules and principles, even by an indifferent judge, in every particular case.¹¹ If these criticisms are correct, the rule of law on which Professor Kautz places so much weight cannot do what he believes it must.

Most legal theorists have responded to these criticisms by seeking to salvage, not abandon, the rule of law. Professor Kautz criticizes one such response, which asks judges to supplement their reliance on legal rules and principles with reliance on political theory. On the surface, his criticism is that legal rules and principles either need no supplementation or cannot be supplemented consistent with the rule

9. I note in passing another danger that arises when political theorists (or lawyers) engage in social criticism. The danger is that their (or our) social criticism will lack empirical support. So, for example, Professor Kautz writes of a decline of popular self-government, focusing on the displacement of popular consent by judicial decision. Recent events suggest a somewhat different story. No one appeared to take seriously the possibility that the courts would have intervened in the impeachment process, and to the extent that the people appeared to have a view on the matter our *representative* institutions, not our judicial ones, appeared to be the ones displacing popular consent. But, I hasten to add, that too is a statement of social criticism, susceptible to the same evidentiary challenge I raise against Professor Kautz.

10. Kautz, *supra* note 3, at 448 n.52.

11. Professor Kautz's only reference to this position is through a quotation from Professors Farber and Sherry, which (wrongly) conflates the indeterminacy claim with a claim about the social function of indeterminacy. See Kautz, *supra* note 3, at 458 n.68.

of law. In either version, however, that criticism is unresponsive to the dilemma exposed by legal theorists.

Even more, Professor Kautz's understanding of coercive law seems to me deficient in ways that explain his failure to understand why some legal theorists think that law needs assistance from political theory. At the end of his paper Professor Kautz contrasts what he calls "the general consensus about freedom of speech" with "the partisan controversy about certain privacy rights."¹² I suppose there is a consensus about freedom of speech in the abstract; virtually everyone, I presume, would respond to a survey by saying they strongly agreed with the proposition that the United States Constitution does and should protect freedom of speech.¹³ The difficulty comes, of course, in specifying what activities are protected by freedom of speech: flag-burning? distribution of sexually explicit but non-obscene material on the Internet? hate speech? large-scale expenditures on political campaigns? And this difficulty is quite general. We can, and may often, find wide agreement—popular consent—on abstractly stated legal rules and principles, while at the same time finding equally wide disagreement about the application of those rules and principles to particular controversies. If the rule of law requires general agreement about the latter, it is in deep trouble, from which, some legal theorists have thought, political theory might rescue it.

I have elsewhere distinguished between the "thin" Constitution and the "thick" one.¹⁴ The thin Constitution consists of the principles of the Declaration of Independence and the Constitution's preamble, which I summarize as a national commitment to universal human rights defensible by reason. In my view the thin Constitution has broad public acceptance. The thick Constitution gives more precise content to these principles. Professor Kautz criticizes the courts for enforcing their particular understandings of the thick Constitution, which he describes as "private judgment[s]."¹⁵ But, properly understood, Professor Kautz's position requires a far more extensive libertarianism than he is willing overtly to endorse. The thin Constitution leaves wide latitude for disagreement about its precise content. For example, the thin Constitution accommodates regimes

12. Kautz, *supra* note 3, at 467.

13. Again I think it worth noting a certain slipperiness in Professor Kautz's formulation. I would think that there is an equally high consensus on "certain" privacy rights, such as the right of married individuals to use contraception. I would guess that the consensus is nearly as high with respect to the use of contraception by unmarried adults. And these, of course, were the rights at issue in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

14. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 9-14 (1999).

15. Kautz, *supra* note 3, at 458.

in which flag-burning legislation is enforced and in which such legislation never is adopted.¹⁶ But flag-burning legislation is, after all, coercive law, and it embodies a contestable private judgment about the thick Constitution's content. The only escape from private judgment enforced through law appears to be a thorough-going libertarianism. But, I would think, the defense of libertarianism is likely to rest on private judgments too.

In fact, Professor Kautz offers another criticism of efforts to supplement law with political theory. This criticism is responsive to the dilemma posed by the law's (moderate) indeterminacy, but it may well be inadequate. It is not, according to this criticism, that legal rules and principles cannot or should not be supplemented, but rather that political theory provides the wrong kind of supplementation. Here I recur to Professor Kautz's discussion of statesmanship. Suppose, contrary to his express argument, that judges as well as executive officials, citizens, and even lawyers can sometimes be statesmen. The idea would then be that judges, faced with conflicting legal rules and principles and as a matter of law able to resolve a particular controversy in divergent ways equally compatible with law, should choose the statesmanlike course. The law is supplemented by the statesman's wisdom.

Two recent Supreme Court cases illustrate statesmanship at work, and the difficulties with statesmanship as a solution to the judicial dilemma described by legal theorists. The joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* opened with the sonorous sentence, "Liberty finds no refuge in a jurisprudence of doubt,"¹⁷ and at the key analytic point asserted that its decision was, and had to be, guided by "reasoned judgment."¹⁸ *Washington v. Glucksberg* asserted that the courts should assess claims that some right is protected by the due process clause only after coming up with a "careful description" of the asserted right.¹⁹ These phrases sound good: Who could favor "unreasoned judgment" or "careless description"? But they have almost no substantive content.²⁰ What they *do*, however, is signal to the public that the judges are acting as statesmen and stateswomen rather than expressing their private judgments about right and wrong.

What, though, does statesmanship mean in the judicial context? In

16. See TUSHNET, *supra* note 14, at 106.

17. 505 U.S. 833, 843 (1991).

18. *Id.* at 849.

19. 117 S. Ct. 2258, 2260 (1997).

20. This is evident in *Glucksberg*, where it is trivially easy to come up with a careful description of a right to assistance in committing suicide in some circumstances; indeed, five justices appear to have done so.

Glucksberg the Court held that there was no general right—today—to assistance in committing suicide in cases of some sorts of medical distress, but it left open two possibilities: expressly, the possibility that the people would revise that judgment through the enactment of legislation protecting the right; and, implicitly, the possibility that the courts would revisit the constitutional claim as social experience with assisted suicide (overt or covert) accumulates.²¹ These two possibilities are the judicial equivalent of the Emancipation Proclamation. They combine a message about the importance of the issue and point in the direction of an appropriate resolution (some protection for the right under some circumstances), but await public consent before imposing the resolution as a matter of coercive law.

The three Justices who wrote the joint opinion in *Casey* clearly thought they were doing something quite similar. They identified a fixed point of justice, which they called the “central holding” of *Roe v. Wade*.²² They acknowledged the claims made against *Roe* by expressing some doubt about *Roe*’s correctness “as an original matter.”²³ They opened up a range of regulation for public debate by upholding some regulations of abortion that were previously barred, and they introduced the theme of gender equality into the law of abortion in a way that might caution the public against adopting other regulations and might lead the public to think differently about the abortion issue more generally.

And yet the question surely remains open: Did the Justices act in a statesmanlike way in *Casey*? As Madison wrote in *The Federalist No. 10*, we have to design our institutions on the assumption that “statesmen will not always be at the helm.”²⁴ Madison knew that executive officials would not always be statesmen, even though they might think of themselves as statesmen. So too with judicial statesmen. Professor Kautz argues that legal rules and principles cannot be supplemented by political theory because political theory is a form of private judgment inappropriate for governing political society. It is unclear to me that the alternative his paper suggests, of supplementing legal rules and principles with the statesman’s wisdom, is any better, in large measure because I doubt that we have public criteria for distinguishing between statesmanship and willfulness, between actions that appropriately lead the public toward justice and actions that impose the judges’ private judgments under the guise of wisdom and statesmanship.

21. Justice Souter’s opinion was explicit on this point. See *id.* at 2291-93 (Souter, J., concurring).

22. *Casey*, 505 U.S. at 860-61.

23. *Id.* at 871.

24. THE FEDERALIST NO. 10, at 44 (James Madison) (Everyman’s Library, 1911).

But perhaps this is too pessimistic. In conclusion, I suggest two paths out: one is a rejection of the rule of law as Professor Kautz conceives it that nonetheless might promote the value of security that he places at the heart of the liberal democratic order; the other is a backhanded defense of statesmanship, political theory, and indeed anything else anyone might offer to supplement the legal rules and principles that legal theory says are inadequate to the task of promoting security.

The first path is Madisonian. The trick here is to make security and rights self-enforcing.²⁵ Set ambition against ambition and we may arrive at security and justice even though no one aims at doing so. Madison's most ingenious explanation is this: Assume that all legislators are purely or predominantly self-interested. Gather enough of them together, and their conflicting self-interests will cancel each other out. In one version the residue is the legislators' minor interest in promoting the public good.²⁶ In another version the residue is the legislators' self-interest in getting *something* done; barred by others from pursuing narrow projects of self-interest, they can only accomplish something if the project they pursue is in the public interest.

Of course it is unclear that Madison's model of a self-enforcing set of rights fits either historical or present reality. And its extension to judges is even less clear. Certainly there is no cancellation or constraint *within* the judiciary. The formal constraints outside it—impeachment, restriction of jurisdiction—have proven to be quite weak. What we might call informal constraints, however, might be rather strong. These informal constraints on judicial power suggest the second path, which returns us to the process of educating the public mind with which I began.

Suppose judges announce a decision purporting to impose coercively their private judgment on some matter, a judgment that the public cannot yet be reasonably be expected to accept. The mere announcement does not mean that the public will be coercively subjected to that judgment. Decisions have to be implemented, and there is good reason to believe that decisions substantially out of line with what important elites (at least) support will have little social impact.²⁷ The overall process of law-making, that is, may induce something like statesmanship in the system as a whole, even though no judge, legislator, or executive actually is a good statesman.

25. I offer a more detailed analysis of self-enforcement in TUSHNET, *supra* note 14, ch. 5.

26. In the more detailed analysis I call this residue the value-based incentives legislators have. *See id.*

27. Here the formal mechanism of control of the judiciary through irregularly timed appointments to a life-tenured bench may play an important role.

If this last suggestion is correct, Professor Kautz's worries—and those of nearly everyone exercised by the apparent demonstration in modern jurisprudence of problems with the concept of the rule of law—might disappear. Pretty much no matter what anyone does or says, the conditions of security in a liberal democracy are established by the overall complexity of the institutions of government in modern liberal democracy.

